LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963
No. 659

METROMEDIA, INC. (substituted for the name of METROPOLITAN BROADCASTING CORPORATION), a Delaware corporation, and PACIFIC OUTDOOR ADVERTISING COMPANY, a California corporation,

Appellants,

vs.

CITY OF PASADENA, a California municipal corporation, DON C. McMILLAN as City Manager of said city, ROBERT McCUE, as Superintendent of Building of said city, BYRON B. GENTRY as City Prosecutor of said city, and PAUL SHAFFER, as Planning Director of said city,

Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLANTS' REPLY BRIEF.

SELIGSON & MORRIS,
Rockefeller Center,
1290 Avenue of the Americas
New York 19, New York,

GIBSON, DUNN & CRUTCHER,
634 South Spring Street,
Los Angeles 14, California,

IVERSON & HOGOBOOM,
458 South Spring Street,
Los Angeles 13, California,
Of Counsel.

CHARLES SELIGSON,
Rockefeller Center,
1290 Avenue of the Americas,
New York 19, New York,

WILLIAM FRENCH SMITH,
634 South Spring Street,
Los Angeles 14, California,

PAUL E. IVERSON,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases	Page
Berman v. Parker, 348 U. S. 26	5
Goldblatt v. Town of Hempstead, 369 U. S. 590	3, 4, 6
Grosjean v. American Press Co., 297 U. S. 233	2
Lovell v. Griffin, 303 U. S. 444	2
Packer Corp. v. Utah, 285 U. S. 105	6
Railway Express Agency v. New York, 336 U. S. 106	6
Saia v. New York, 334 U. S. 558	2
Valentine v. Chrestensen, 316 U. S. 52	3
Village of Euclid v. Ambler Realty Company, 272 U. S. 365	4

IN THE

Supreme Court of the United States

October Term, 1963
No. 659

METROMEDIA, INC. (substituted for the name of METROPOLITAN BROADCASTING CORPORATION), a Delaware corporation, and PACIFIC OUTDOOR ADVERTISING COMPANY, a California corporation,

Appellants,

vs.

CITY OF PASADENA, a California municipal corporation, DON C. McMILLAN, as City Manager of said city, ROBERT McCUE, as Superintendent of Building of said city, BYRON B. GENTRY, as City Prosecutor of said city, and PAUL SHAFFER, as Planning Director of said city,

Appellees.

On Appeal From the California District Court of Appeal for the Second Appellate District.

APPELLANTS' REPLY BRIEF.

I.

Appellees purport to justify the ordinances by contending that they do not prohibit Appellants' outdoor medium of public communication but merely confine it to surface locations. The undisputed fact is, however, and the Trial Court found, that the effect of the ordinances is to totally prohibit the entire outdoor medium anywhere in Appellee City including the substantial commercial, manufacturing and industrial areas. The

prohibition is absolute even though this medium was found to be a compatible and proper use in these areas. This result was accomplished by coupling height limitations upon surface signs with the prohibition of roof signs. The known unavailability of locations together with attrition complete the prohibition within a five-year period. [Findings of Fact Nos. 4, 24, 29; Clk. Tr. pp. 25, 32, 34].

The ordinances constitute a method of total prohibition irrespective of the propriety of the use. As this Court stated in *Saia v. New York* (1948), 334 U.S. 558, referring to the ordinances in that case and in *Lovell v. Griffin* (1938), 303 U.S. 444, the ordinances were "dressed in the garb of the control of a 'nuisance' " [334 U.S. 560]. The disguise was unsuccessful and the ordinances struck down.

But in any case Appellants' position is not dependent upon whether the regulation constitutes total prohibition. A substantial interference with the means of disseminating ideas, opinions and information is enough. *Grosjean v. American Press Co.* (1936), 297 U.S. 233. While Appellants do not usually themselves express their views through their roof signs, they furnish the means through which others are enabled to do so. The validity of the extinguishment or regulation of those means certainly raises a substantial federal question for the Court.

While prohibiting Appellants' outdoor medium, the ordinances permit signs which advertise services or products available in the building below. A sign over a drug store may advertise a pill or patent medicine sold below but it would be illegal for a proponent of a ballot

measure or for a candidate to use this sign to communicate his message to the public.

Valentine v. Chrestensen (1942), 316 U.S. 52, is not controlling here. That case was decided upon the basis of a specific intent and purpose to evade the effect of an ordinance by means of a false use of a protected medium of reaching the public. Here it is the medium itself that is destroyed. Certainly no one would contend that the purchase of space on Appellants' signs to convey a political or any other kind of message to the public, would be for the purpose of evading the ordinances of Appellee City.

It is undeniable that the ordinances prohibit throughout Appellee City, and irrespective of proper zoning use, an entire medium of public expression and communication. Because it is relatively inexpensive, it is available to far more persons than other comparable means of communication. It is available to any person or organization desiring to communicate ideas to the public. The prohibition of such a medium clearly raises substantial questions concerning the guarantees of freedom of speech and press. We urge that the validity of ordinances which have this effect should be considered by this Court.

II.

In Appellees' Motion to Dismiss, Appellees merely attempt to demonstrate that the Appellees have met the criteria set forth in *Goldblatt v. Town of Hempstead* (1962), 369 U.S. 590, for determining whether the purported exercise of the police power is proper. First, Appellants submit that this very issue is a substantial federal question and that Appellees have tacitly admitted it to be so in their brief.

Next, applying the *Goldblatt* criteria, Appellees have neither shown that there is a public interest involved which needs protection, *i.e.* a legitimate aspect of the police power upon which the challenged legislation is based, nor have they shown that the challenged ordinances are reasonably necessary for the accomplishment of such purpose.

Throughout the history of this case, Appellees have never made clear just which public interest or aspect of the police power they rely upon. In *Goldblatt, supra*, at page 595, this Court stated that "the ordinance in question was passed as a safety measure, and the Town is attempting to uphold it on that basis." In Appellees' Motion to Dismiss, they state such basis to be "the basis for zoning", and they rely on *Village of Euclid v. Ambler Realty Company* (1926), 272 U. S. 365. In that case, the Court upheld the complete exclusion of businesses and trades of every sort from residential zones on the ground that such exclusion bore "a rational relationship to the health and safety of the community." [272 U.S. 391].

It is evident that this case presents the situation contemplated by the Court in *Village of Euclid v. Ambler, supra*, when it observed ". . . when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable." [272 U.S. 395].

Other bases mentioned by Appellees are "traffic hazards", "sign blight" (pages 14-15), "preservation

of balance of land used for the protection of its people", "preservation of property values", and maintenance of "dignity of surroundings" (pages 16-17).

In the present case the ordinances were not based upon or related to traffic safety. The Trial Court specifically found no connection whatever between the ordinances and any traffic safety purpose. [Findings of Fact Nos. 25-28, Clk Tr. p. 33]. This would appear obvious since the identical sign is lawful or unlawful, depending upon whether it is on one building or next door or on whether its message advertises a particular product or some other. Any traffic safety consideration by definition would apply to both.

It is presumed that by using the terms "sign blight, dignity of surroundings" and "preservation of property values", Appellees have in mind what can be generally called aesthetics. Though aesthetics has been recognized by this Court as a proper basis for the exercise of the power of eminent domain, *Berman v. Parker* (1954), 348 U.S. 26, it has never held that aesthetics was such a public interest as to justify in itself the exercise of the police power to eliminate a business without any compensation. Moreover, assuming for the sake of argument that aesthetics is such an essential public interest, Appellants have demonstrated that the means used here are not reasonably necessary for the accomplishment of such purpose and are unduly oppressive and arbitrary. The testimony adduced at the Trial Court makes it clear that if any aesthetic problem exists it lies with the permitted signs and not the prohibited. [Findings of Fact No. 23, Clk. Tr. p. 32, Rep. Tr. p. 314]. Appellees' argument based upon aesthetics, loses much of its weight when applied to the zones to which the chal-

lenged ordinances are made applicable, namely the commercial, industrial and manufacturing zones.

Preservation of balance of land uses is a nebulous concept, one which is difficult of application in the present situation. The only land, the use of which is attempted to be preserved, are roof tops, on which certain signs other than those belonging to Appellants are allowed to be placed. It can hardly be conceived how the elimination of Appellants' signs can preserve any land use, even if such preservation can be said to be a legitimate aspect of the police power.

In any event, the record shows and the Trial Court found that the Appellants have met their burden of showing that the ordinances are unreasonable and have overcome the presumption of reasonableness belonging to the state. *Goldblatt v. Town of Hempstead, supra.* Appellees of course, disagree with this contention. Thus a substantial federal question is presented for decision by this Court.

III.

Appellees rely on *Railway Express Agency v. New York* (1949), 336 U.S. 106, to sustain the ordinances. An examination of that case does not support such a position. The regulation in that case was specifically based upon the existence of traffic safety considerations and the possible difference in the nature and extent of the prohibited and permitted signs. The free speech and press issue was not involved in that case nor did the Court have before it the validity of a discrimination adversely affecting a medium for the dissemination of ideas, information and opinions.

Appellees also rely on *Packer Corp. v. Utah* (1932), 285 U.S. 105. However, in that case the ordinances in

question were reasonably related to public health, safety and morals since one of its purposes was to prevent the danger of smoking by minors, and the distinction between billboards and other types of advertising was based in large part on the fact that prohibition of billboard advertising of tobacco would not violate the Interstate Commerce clause of the Constitution, whereas a like prohibition with regard to periodicals or newspapers would have been such a violation. Of course, no such considerations are present here.

Conclusion.

Appellees have not shown that the questions set forth in Appellants' Jurisdictional Statement are not such substantial federal questions as would be proper for this Court to decide. For the foregoing reasons and the reasons set forth in Appellants' Jurisdictional Statement, there is sufficient and vital basis and cause for this Court to hear the appeal in this matter.

Respectfully submitted,

CHARLES SELIGSON,
WILLIAM FRENCH SMITH,
PAUL E. IVERSON,
Attorneys for Appellants.

Of Counsel:
SELIGSON & MORRIS,
GIBSON, DUNN & CRUTCHER,
IVERSON & HOGOBOOM.

MICRO CARD 22
TRADE MARK ®

PC2352

MATTHEW BENDER & COMPANY

49-6

microcard